No. 10173.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA EMPLOYMENT COMMISSION, an administrative agency of the State of California,

Appellant,

vs.

BERLIN AND RUSSELL AIRCRAFT MACHINE AND MANUFACTURING COMPANY, a copartnership of H. M. Berlin and C. T. Russell,

Appellee.

BRIEF FOR APPELLEE.

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Opinion Below.

The previous opinion in this case is the ORDER PROVIDING THAT DEBTOR IS NOT SUBJECT TO CALIFORNIA EMPLOYMENT COMMISSION FOR UNEMPLOYMENT TAXES. [R. 10-14.]

Jurisdiction.

This appeal involves California Unemployment Insurance Taxes claimed by the State of California for the year 1941, which claim was denied by the District Court of the United States for the Southern District of California, Central Division, by Order of January 26, 1942. [R. 10-14.] On April 3, 1940, the Debtor, Appellee herein, filed in the United States District Court, a Petition under Chapter XI of the Federal Bankruptcy Act as amended by

the Act of June 22, 1938. By Order dated April 4, 1941, the District Court granted said Petition. On November 25, 1941, the California Employment Commission filed its proof of claim in the District Court for the taxes and interest here involved. The jurisdiction of the District Court to pass on such claim is found in Sections 2(a) (2) and 351 of the Federal Bankruptcy Act as amended in 1938. The Order of the District Court was filed January 26, 1942, and Notice of Appeal was filed on February 20, 1942. [R. 4-5.] The case is before this Court pursuant to the provisions of Section 128(c) of the Judicial Code and Section 24 of the Federal Bankruptcy Act as amended in 1938.

Question Presented.

The sole issue is whether the Appellee is an "Employer" within the definition of that term in Section 9(a) of the California Unemployment Insurance Act, the determination of such question being dependent on whether the Appellee employed four or more individuals on each of some twenty days during the calendar year 1941, each day being in a different week. During 1941 the Appellee employed four or more persons from January 2 to May 16, inclusive, but employed none after the latter date.

Errata.

On page 2 of the Record in the 5th line from the bottom, the date November 7, 1941, should read November 7, 1940. Likewise on page 3 of Appellant's Brief, in the 11th line, November 7, 1941, should read November 7, 1940.

Statutes.

Section 9 of the California Act, Chapter 352, Laws of 1935, as amended, provides in part as follows:

> "Sec. 9. Employer means:
>
> "(a) Any employing unit, which for some portion of a day, but not necessarily simultaneously, *in each of twenty different weeks,* whether or not such weeks are or were consecutive, *has within the current calendar year* or had within the preceding calendar year in employment four or more individuals, irrespective of whether the same individuals are or were employed in each such day; provided, that prior to January 1, 1938, employer means any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, has within the current calendar year or had within the preceding calendar year in employment eight or more individuals, irrespective of whether the same individuals are or were employed in each such day;" (Italics supplied.)

Sections 37 and 38 of the California Act relate to contributions and, so far as pertinent, provide as follows:

> "Sec. 37(a) On and after January 1, 1936, contributions to the unemployment fund shall accrue and become payable by every employer *for each calendar year* in which he is subject to this act, with respect to wages paid for employment occurring during the calendar year 1937 and upon wages payable during subsequent calendar years; provided, however, that if and when the taxes payable under Title IX of the Federal Social Security Act (or the corresponding provisions of the Internal Revenue Code, or any other Federal Act into which such tax now is or hereafter

may be incorporated) become payable on a basis of 'wages paid' rather than 'wages payable', then as of that time the contributions due hereunder shall thereafter be upon wages paid. Such contributions shall become due and be paid to the commission for the unemployment fund by each employer in accordance with such regulations as the commission may prescribe, and shall not be deducted in whole or in part, from the wages of individuals in his employ." (Italics supplied.)

"Sec. 38. Every such employer shall pay into the employment fund contributions equal to the following amounts:

* * * * * * * *

"(c) For the year 1938 and thereafter, two and seventy one-hundredths per cent of all wages with respect to which contributions become due and payable for employment subject to this act.

"If, when, and during such time as the excise tax required of employers by Section 901 of the Social Security Act (or the corresponding provisions of the Internal Revenue Code or any other Federal act into which such tax now is or hereafter may be incorporated) is payable only upon $3,000 or less wages earned in any calendar year by any individual from any single employer as defined in section 907 of that act, (or the corresponding provisions of the Internal Revenue Code, or any other Federal act into which such tax now is or hereafter may be incorporated) the contributions required to be paid by every employer by subsection (c) hereof shall be payable only upon $3,000 or less of wages earned in any calendar year by any worker employed by such employer."

Statement.

The facts contained in the stipulation of facts in the trial court are set forth in the Order of the District Court that the Appellee is not subject to the California Employment Taxes, in paragraphs numbered (1) to (7) [R. 11-13]. The Appellee is a copartnership organized November 7, 1940. During the period from January 1, 1941, to May 16, 1941, inclusive, Appellee employed eight or more persons on each week day with the exception of holidays and some Saturdays. The Appellee had no employees after May 16, 1941, when it ceased to do business. It did not file any returns under the Federal Unemployment Tax Act or under the California Unemployment Insurance Act for the reason that it believed it was not liable for the said tax under either of said Acts. Its payroll for the first quarter of the calendar year 1941 ending March 31, 1941, was $42,400.17, and for the period April 1, 1941 to May 16, 1941, inclusive, its payroll was $23,828.88.

On April 3, 1941, Appellee filed in the United States District Court for the Southern District of California, a Petition for an arrangement under Chapter XI of the Federal Bankruptcy Act, which Petition was granted by order of said Court on April 4, 1941. On November 25, 1941, Appellant filed its proof of claim for California Unemployment taxes in the amount of $1,798.83 plus interest [R. 3-4] for the period January 1 to May 16, 1941. Payment of said claim was opposed by Appellee on the ground that it did not owe any of said taxes. [R. 10-13.]

After a hearing in the District Court an order was entered holding that under the provisions of Section 9, Section 37 and Section 38 of the California Unemployment Insurance Act, the calendar year extending January

1 to December 31, inclusive, constitutes the taxable year; that a week constitutes a period of 7 days beginning Sunday morning and ending the following Saturday night and wholly within one and the same calendar year; that a day may be counted as being a day during a taxable (calendar) year, only in the event that such day is one of the 7 days of one and the same week falling entirely within one and the same calendar year and that the twenty-weeks period specified in said Act means 20 calendar weeks, each week beginning on Sunday morning and ending the following Saturday night, and all of such weeks falling wholly within one and the same calendar year; and that since January 1, 1941, fell on a Wednesday and May 16, 1941, fell on a Friday, such period extending from January 1, 1941, to May 16, 1941, inclusive, constituted less than 20 weeks within the calendar year of 1941; and that the Debtor herein is not subject to the California Unemployment Insurance Act and that the claim of the California Employment Commission heretofore filed herein for unemployment tax "be and the same is hereby denied." [R. 13-14.]

Summary of Argument.

Appellee is not subject to the California Unemployment Insurance Act for the reason that it did not employ four or more persons on each of some twenty days during the year 1941, each day being in a different calendar week, inasmuch as the "different weeks" specified in Section 9(a) of the California Unemployment Insurance Act mean full weeks of 7 days each, each week beginning on Sunday morning and ending the following Saturday night, which different weeks must be wholly within one and the same calendar year.

ARGUMENT.

Appellee Did Not Employ Four or More Persons on Each of Some 20 Days During the Calendar Year 1941, in Different Calendar Weeks Wholly Within That Calendar Year, and Was Therefore Not an Employer Under the California Unemployment Insurance Act.

In its brief (page 9), Appellant states that,

> "Apparently no dispute exists as to the meaning of the term 'week.' Under Rule 12.1 of the California Unemployment Commission the term 'week' corresponds to the calendar week, commencing Sunday and ending Saturday. The same definition was adopted by the District Court. [R. 13.]"

In that definition Appellee concurs.

Appellee claims, and it has been upheld by the United States District Court, that during the period January 1, 1941, to May 16, 1941, inclusive, there were not 20 days within the calendar year 1941, each day being in a different calendar week, which met the employment requirements of the Act. The Court below agreed with Appellee's contention that under the provisions of the California Unemployment Insurance Act, a day may be counted as being one of the 20 days provided in Section 9(a) of such Act only in the event that such day is one of 7 days of one and the same week falling *wholly* within one and the same calendar year, and that the 20 weeks so specified mean 20 calendar weeks, each week beginning on Sunday morning and ending the following Saturday night, and all of such weeks falling wholly within one and the same calendar year.

The paragraph last quoted from Section 38 of the California Act makes it clear that the Legislature was dealing only with wages paid by an employer within a calendar year, and that the calendar year is therefore necessarily the sole basis for all computations of both wages and time of employment in order to determine the liability of any employer for such tax. Section 38, *supra,* speaks of "wages earned in any *calendar* year." It is obvious, therefore, that the Legislature selected the calendar year beginning January 1 and ending December 31, as the taxable year, and as the exclusive period of time for which the wages paid by an employer to an employee were to be so taxed, as well as the period for determining the question whether an employer "has within the *current* calendar year" and "in each of 20 different weeks," four or more individuals in employment, and that each of such 20 days must therefore be in a different complete calendar week during the same calendar year.

Consequently, the fixing of the current calendar year by the Legislature as the taxable year, and as the period for which the tax is to be levied upon the total wages paid by an employer to his employees, would definitely seem to preclude the use of any number of days in either a preceding or succeeding calendar year for the purpose of determining either (1) the statutory period of 20 different weeks within each calendar year, or (2) wages paid in the calendar year during which such tax liability, if any, is incurred.

It is a matter of common knowledge that taxation, both State and Federal, is normally on an annual basis and that a taxable year is a calendar year unless otherwise specified. It is noteworthy, however, that in the Act

imposing an unemployment tax the Legislature left no doubt on this point by specifically confining the application of the tax to the "calendar year," and by assessing in Section 38(c):

> "For the year 1938 and thereafter, two and seventy one-hundredths per cent of all wages with respect to which contributions become due and payable for unemployment subject to this Act."

Obviously, therefore, the State cannot include any period of time in either a prior or a succeeding year for the purpose of determining the wages upon which the tax shall apply, and by the same token it cannot go back to a prior year or forward to a succeeding year for the purpose of computing a calendar week to make up one or more of the 20 different weeks with respect to employment "within the current calendar year."

Attention is further invited to the fact that in Section 9(a) of the California Unemployment Insurance Act, after providing for employment of four or more persons on a day in each of 20 different weeks, that section continues "whether or not such weeks are or were consecutive." As has already been shown, a calendar week consists of 7 full days beginning Sunday morning and ending the following Saturday night, and in using the term, "20 different weeks," which Appellant admits means calendar weeks, the Legislature must have had in mind full calendar weeks and not partial calendar weeks. Otherwise, it would have been impossible to define a measure of time as a "different week" in providing that the 20 weeks need not be consecutive. In view of the fact that the Legislature made no provision for a partial calendar week, we believe it necessarily follows that a calendar week with-

in the current calendar year means a full and complete calendar week of 7 successive days wholly within each separate calendar year. The District Court has so held.

The fixing of 20 different calendar weeks and four or more employees as criteria for the purpose of determining who is an employer within the meaning of the California Unemployment Insurance Act was, of course, purely arbitrary. The Legislature could have fixed either a greater or lesser number of weeks or employees, as such determination is properly within its province. Therefore, if an employer has in his employ four or more individuals on one day of each of 19 different calendar weeks in the year, he does not fall within the definition of an employer and is not subject to the unemployment tax. Employment in each of 20 different weeks in the year is mandatory.

This contention is illustrated and confirmed by the decision of the Supreme Court of the United States in *Carmichael v. Southern Coal Co.,* 301 U. S. 495, where the Court had before it for decision the question whether the Unemployment Compensation Act of Alabama (one of the group of laws enacted by a number of the states following the lead and pattern of the Federal Social Security Act which levied a Federal unemployment tax) was constitutional.

In holding the Alabama law valid the Court, speaking through Mr. Justice Stone, pointed out that the said Act:

> "* * * sets up a comprehensive scheme for providing unemployment benefits for workers employed within the state by employers designated by the Act. These employers include all who employ eight or more persons for twenty or more weeks *in the year,* Sec.

2(f), except those engaged in certain specified employments.

* * * * * * * *

"(a) Exclusion of Employers of Less than Eight. Distinctions in degree, stated in terms of differences in number, have often been the target of attack, see Booth v. Indiana, 237 U. S. 391, 397, 59 L. ed. 1011, 1017, 35 S. Ct. 617. It is argued here, and it was ruled by the court below, that there can be no reason for a distinction, for purposes of taxation, between those who have only seven employees and those who have eight. Yet, this is the type of distinction which the law is often called upon to make. It is only a difference in numbers which marks the moment when day ends and night begins, when the disabilities of infancy terminate and the status of legal competency is assumed. It separates large incomes which are taxed from the smaller ones which are exempt, as it marks here the difference between the proprietors of larger businesses who are taxed and the proprietors of smaller businesses who are not." (Italics supplied.)

The Court thus lent special emphasis to the fact that the number of employees, the number of days, and the number of weeks specified in such legislation are entirely arbitrary, but by the same token the lines of demarcation so laid down must be strictly observed no less by the State than by taxpayers.

Continuing its discussion of exemption of particular classes of employers the Court in the *Carmichael* case made the following significant pronouncement:

"Similarly, the legislature is free to aid a depressed industry such as shipping. The exemption of busi-

> ness operating for *less than twenty weeks in the year* may rest upon similar reasons, or upon the desire to encourage seasonal or unstable industries." (Italics supplied.)

The foregoing quotation would seem to be an explicit approval of our contention that the tax in question is levied only upon those employers who have four or more employees for *at least* 20 *different* weeks *"within the current calendar year."* The context of the quotation clearly shows that the Court must have had in mind 20 full calendar weeks *"in the year."*

January 1, 1941, which was a holiday and on which day the Appellee did not have four or more employees engaged in work, fell on Wednesday. Even including that day, however, during the period from January 1, 1941, to May 16, 1941, inclusive, the latter being the last day on which Appellee had any employees (and then went out of business) there were only 18 full calendar weeks of 7 successive days each, as the first 4 days of January did not constitute a calendar week, nor did the 6-day period from Sunday, May 11, to Friday, May 16, 1941, the last day on which the Appellee had any employees, constitute a calendar week.

Appellant relies upon the decision of the United States District Court for the District of Massachusetts in *Garage Service Corporation v. Hassett*, 42 Fed. Supp. 791, which, with the decision in favor of Appellee's contention by the District Court in the instant case, apparently are the only two decisions by the courts on the question involved, with the exception of the *Carmichael* case, *supra*. In the *Garage Service Corporation* case, the Court disagreed with the plaintiff's contention that the calendar week from which

a day is taken must fall wholly within the taxable year, saying,

> "* * * Such a day, provided it is within the taxable year, may be taken from any calendar week, whether the calendar week is wholly within the calendar year or not, as is the case here of the week in which January 2 fell. * * *"

If that Court is correct in the statement just quoted, there is not only a departure from the basic scheme of both Federal and State taxation on an annual basis, which is now so firmly established as to require no citations of authority, but it is also a denial of the specific intent of Congress with reference to the Federal Unemployment Tax Act. which deals with wages paid during the calendar year and with the calendar year in the computation of time. The pattern of the Federal Act was closely followed by the states having their own unemployment tax or insurance acts. Bearing in mind, therefore, the fact, which we do not believe can be successfully controverted, that the plan of both the Federal Unemployment Tax Act and the California Unemployment Insurance Act is based entirely upon the calendar year, the error into which we believe the Massachusetts Court fell in the *Garage Service Corporation* case is apparent and can be demonstrated by visualizing the situation which would result from the application of that Court's theory. For example, in 1940, December 29, 30, and 31 fell respectively on Sunday, Monday and Tuesday, while in 1941, January 1, 2, 3 and 4 fell respectively on Wednesday, Thursday, Friday and Saturday. Consequently there were two normal working days in 1940 and three (barring January 1, a holiday) in 1941 during the 7-day period from Sunday, December 29, 1940 to Saturday, January 4, 1941,

which constitutes a calendar week. Under the theory of the Massachusetts Court, therefore, it would be possible to count one day, either December 30 or 31 in 1940, for the purpose of making up the statutory 20-week period within the calendar year 1940, assuming that there were already 19 calendar weeks of employment in that year, and at the same time count either January 2, 3 or 4, 1941, for the purpose of making up the 20-week period within the year 1941, likewise assuming 19 calendar weeks of employment in that year, thereby using the *same* calendar week of December 29, 1940 to January 4, 1941, *twice,* once in 1940 and again in 1941, for the purpose of making an employer liable to the unemployment tax, when such computation is plainly and specifically prohibited by Section 9(a) of the California Unemployment Insurance Act which requires employment on some day, "in each of 20 *different* weeks" and "within the current calendar year." In the *Garage Service Corporation* case the Court was dealing with the Federal Unemployment Tax Act, which likewise contains in Section 1607(a) a requirement that in computing "each of some 20 days during the taxable year" each day must be "in a *different* calendar week." It seems clear beyond question that the same calendar week cannot be used in each of two calendar years for the purpose of finding 20 days of employment in each calendar year in *different* calendar weeks.

Again, if the State's theory is correct, but such week beginning December 29, 1940, and ending January 4, 1941, should be counted as only one of the 20 *different*

weeks, the question arises, in which year, 1940 or 1941, may it be counted? Also, who shall elect in which year it shall be used, the State or the employer? The fact is that there is no right of election given to the State, the Federal Government, or the employer, in either the State or Federal law, and without such right no such choice of years is available to either party.

The difficulties and inconsistencies above pointed out demonstrate the invalidity of Appellant's assertion that one of the first 4 days in January, 1941, may be counted to provide one of the 20 *different* weeks in 1941. Without it we submit that Appellant's case must fail, inasmuch as there were only 18 full calendar *different* weeks meeting the employment requirements in this case in 1941. Neither the 4 days from January 1 to January 4, inclusive, nor the six days from Sunday, May 11, to Friday, May 16, constituted statutory calendar weeks.

If it be objected that such interpretation exempts certain employers from the tax, a complete answer is found in the decision of the Supreme Court of the United States in the *Carmichael* case, *supra,* in the language of Mr. Justice Stone who, referring to the arbitrary distinction between those employers who have only seven employees and those who have eight, remarked that this is the type of distinction which the law is often called upon to make; that it is only a difference in numbers which marks the moment when day ends and night begins, and that it separates large incomes which are taxed from the smaller

ones which are exempt, "as it marks here the difference between the proprietors of larger businesses who are taxed and the proprietors of smaller businesses who are not."

The rule for which the State contends would, by using partial calendar weeks at the beginning and end of each year, result in there being 54 weeks in many years instead of the usual 52; a somewhat startling phenomenon.

It would seem that the terms "20 different weeks" and "within the current calendar year" as found in Section 9(a) of the California Unemployment Insurance Act are so plain and explicit in their meaning that they should not be misunderstood or misinterpreted. In that connection the rule of *United States v. Merriam,* 263 U. S. 179, 68 L. Ed. 240 is pertinent:

> "* * * in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer. Gould v. Gould, 245 U. S. 151, 153, 62 L. ed. 211, 213, 38 Sup. Ct. Rep. 53. * * *"

In its Brief, Appellant states that the statute, Section 9(a), does not, either directly or by implication, require the 20 days to fall in 20 different full calendar weeks within the calendar year. We respectfully submit that not only by implication but directly, Section 9(a) does require the 20 days to fall in 20 different full calendar weeks within the calendar year, for it uses the terms "in each of 20 different weeks" and, speaking of employment, "within the current calendar year."

It appears, furthermore, that our contentions in this respect are upheld by the State's own administrative rulings. The following are excerpts from Codified Interpretative Opinions under the California Act:

Opinion No. 2009-02, March 10, 1941:

> "Section 9(a) of the Act as amended effective August 27, 1939, provides in part that a subject employer (prior to January 1, 1938) was 'any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, has within the current calendar year or had within the preceding calendar year in employment eight or more individuals * * *.' Since the 'M' Company had the requisite employment experience; i. e., eight or more individuals in employment on some portion of a day *in each of twenty different weeks during the preceding calendar year* (1936) it fell squarely within the provisions of amended Section 9(a) and therefore became subject to the Act on the effective date of the section; i. e., August 27, 1937." (Italics supplied.)

Opinion No. 5011-01, February 7, 1941:

> "*Since the calendar year is the unit or period for the determining of contribution liability,* only the net wages for the year are properly taxable as provided by Section 11(b) and Rule 11.6. To arrive at a net wage for the year all business expenses properly deductible which are incurred during the calendar year may be deducted from the earnings for the entire year. Thus, where business expenses exceed earnings in one calendar quarter these expenses may be carried into a subsequent calendar quarter and deducted

from the earnings during that quarter. This procedure may be followed until the expenses are exhausted or *until the final quarter of the year has been reached,* whichever occurs first. The $50.00 excess in expenses incurred by 'S' during the first quarter of the year may be deducted from the $100.00 in net earnings realized in the second quarter, and the reports filed by 'M' Company will show only $50.00 net earnings for the second quarter.

"Where the final quarter of the calendar year shows an excess of expenses over earnings, *this excess may not be carried into the next calendar year.* However, if net wages have been reported for prior calendar quarters in the same calendar year, an adjustment may be made and a credit granted the employer for an overpayment. In making this adjustment, the expenses should be prorated among the various quarters in which net earnings have been reported." (Italics supplied.)

Both of these rulings under the California Act show clearly that the State of California has made the calendar year the *exclusive* unit or period of time for determining the liability of an employer under the Unemployment Insurance Act. The first opinion cited refers specifically to "some portion of a day in each of 20 different weeks during the preceding calendar year." Inasmuch as a week is admittedly a full period of 7 successive days, the State recognized the necessity of there being employment on some portion of a day in each of 20 different calendar weeks which fell within the calendar year.

The second opinion above quoted recognizes the exclusiveness of the calendar year as the unit for the compu-

tation of both time and wages when it says that any excess of expenses over earnings "may not be carried into the next calendar year." Clearly the line of demarcation must be sharply drawn at the beginning and end of a calendar year for the computation of both wages and time.

We again desire to emphasize the fact that to permit a partial calendar week at the beginning or end of a calendar year to be counted as one of the 20 different calendar weeks, would allow the same calendar week to be used twice, once in each of two successive years, and would completely destroy the whole fabric and intent of Section 9(a) of the California Unemployment Insurance Act, which refers to "each of 20 different weeks," with reference to employment "within the current calendar year."

Conclusion.

The decision of the Federal District Court in this case is correct and should be affirmed.

Respectfully submitted,

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